# Abdul Wahab bin Hassan & Ors v Suruhanjaya Pilihanraya Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–327–12 OF 2017
AZIZAH NAWAWI J
29 JANUARY 2018

*Civil Procedure — Judicial review — Application for leave — Applicants applied for leave to commence judicial review seeking court's order to quash admission and/or retention of names into 'Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017', declaration that admission and/or retention of names unconstitutional and order for stay of enforcement of admission and/or retention of names — Applicants had also filed appeal — Whether abuse of court's process — Whether there were exceptional circumstances*

This was an application for leave to commence judicial review proceedings seeking the following orders: (a) a certiorari order to quash the admission and/or the retention of names in encl A ('the proposed names') into 'Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017' ('the RDPT') together with any actions that arise from and/or to affirm the said RDPT by the respondents and/or their agents and/or their employees and/or their officers; (b) a declaration that the admission and/or the retention of the proposed names in encl A into RPDT 2017 was unconstitutional; and (c) for an order of a stay of the certification and/or the *gazettement* and/or enforcement of the admission and/or the retention of the proposed names in encl A in RDPT 2017 until the final decision for this judicial review application. The respondents submitted that since there was a statutory appeal process pursuant to reg 20(1) of the 'Peraturan-Peraturan Pilihanraya (Pendaftaran Pemilih) 2002' ('the 2002 Regulations') and that the circumstances of the present case did not fall within the exceptional circumstances, then this application for leave ought to be dismissed. Added to that, since the applicants had also filed an appeal under reg 20, then this application was an abuse of the process of the court.

**Held**, granting the application for leave:

(1) Subregulation 20(4) provided that the determination of the appeal under sub-reg 20(1) shall be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground. As such, in view of the ouster clause in sub-reg 20(4) of the 2002 Regulations with regards to the determination of the appeal, it would be a futile attempt for

A the applicants to be confined only to the appeal process. Therefore, there was a special circumstance in the present case which justified the granting of leave (see paras 24–26).

**[Bahasa Malaysia summary**

B Ini adalah permohonan untuk izin memulakan prosiding semakan kehakiman memohon perintah-perintah berikut: (a) perintah certiorari untuk membatalkan perakuan dan/atau pengekalan nama-nama dalam lampiran A ('nama-nama yang dicadangkan') ke dalam 'Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017' ('the RDPT') bersama dengan apa-apa tindakan C yang berbangkit daripada dan/atau untuk mengesahkan RDPT tersebut oleh responden-responden dan/atau ejen-ejen mereka dan/atau pekerja-pekerja mereka dan/atau pegawai-pegawai mereka; (b) perisytiharan bahawa perakuan dan/atau pengekalan nama-nama yang dicadangkan dalam lampiran A ke D dalam RPDT 2017 adalah tidak berperlembagaan; dan (c) untuk perintah penangguhan sijil dan/atau *pewartaan* dan/atau penguatkuasaan perakuan dan/atau pengekalan nama-nama yang dicadangkan dalam lampiran dalam RDPT 2017 sehingga keputusan akhir untuk permohonan semakan kehakiman ini. Responden-responden berhujah bahawa memandangkan E terdapat proses rayuan statutori berikutan peraturan 20(1) Peraturan-Peraturan Pilihanraya (Pendaftaran Pemilih) 2002 ('Peraturan-Peraturan 2002') dan bahawa keadaan kes ini tidak terangkum dalam keadaan pengecualian, dengan itu permohonan ini untuk izin patut ditolak. Tambahan kepadanya, memandangkan pemohon-pemohon juga telah F memfailkan rayuan di bawah peraturan 20, dengan itu permohonan ini adalah penyalahgunaan proses mahkamah.

**Diputuskan**, membenarkan permohonan untuk kebenaran:

G (1) Subperaturan 20(4) memperuntukkan bahawa penentuan rayuan di bawah subperaturan 20(1) akan menjadi muktamad dan tidak akan dicabar atau disoalkan dalam, atau ke belakang, diubah atau dibatalkan oleh, mana-mana mahkamah atau apa-apa alasan. Dengan sedemikian, mengambil kira klausa penyingkiran dalam subperaturan 20(4) H Peraturan-Peraturan 2002 berkaitan kepada penentuan rayuan, ia akan menjadi percubaan yang sia-sia untuk pemohon-pemohon hanya terhad kepada proses rayuan. Oleh itu, terdapat keadaan khas dalam kes ini yang menjustifikasikan pemberian izin (lihat perenggan 24–26).]

I **Notes**

For cases on application for leave for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5950–5953.

**Cases referred to**

*Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193; [2007] 5 CLJ 363, CA (refd)

*Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, SC (refd)

*Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal for Ulu Kinta & Ors* [1972] 1 MLJ 70, FC (refd)

*Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] MLJU 1796; [2017] 1 LNS 1722, HC (refd)

*Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1, FC (refd)

*Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113, FC (refd)

*Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Glugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

*National Land Finance Co-operative Society Ltd v Ketua Pengarah Hasil Dalam Negeri* [1998] MLJU 235; [1998] 4 CLJ Supp 232, HC (refd)

*QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164, CA (refd)

*Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 4 MLJ 771; [2010] 5 CLJ 574, CA (refd)

*Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235, CA (refd)

**Legislation referred to**

Elections Act 1958 s 8

Elections (Registration of Electors) Regulations 2002 regs 17, 20, 20(1), (4)

Federal Constitution arts 113(1), (2), 114, 119

*Gobind Singh Deo (Michelle Ng, Joanne Chua and Jamie Lee with him) (JM Lee & Co) for the applicants.*

*Suzana Atan (Shamsul Bolhassan and Nik Azrin Zairin bt Nik Abdullah with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.*

**Azizah Nawawi J:**

APPLICATION

**[1]** This is an application for leave to commence judicial review proceedings seeking the following orders:

(a) a certiorari order to quash the admission and/or the retention of names in encl A ('the proposed names') into 'Rang Daftar Pemilih Tambahan Suku Ketiga Tahun 2017' ('the RDPT') together with any actions that arise from and/or to affirm the said RDPT by the respondents and/or their agents and/or their employees and/or their officers;

(b) a declaration that the admission and/or the retention of the proposed names in encl A into RPDT 2017 is unconstitutional; and

(c) for an order of a stay of the certification and/or the *gazettement* and/or enforcement of the admission and/or the retention of the proposed names in encl A in RDPT 2017 until the final decision for this judicial review application.

**[2]** The grounds of the application are:

(a) that the admission and/or retention of the proposed names is unconstitutional since it does not fulfill the requirement of art 119 of the Federal Constitution;

(b) that the public inquiry to hear the objections raised by the applicant against the admission of the proposed names into the RDPT was rigged with irregularities;

(c) that the public inquiry violated the rules of natural justice and does not properly adopt the procedures provided in the 2002 Regulations; and

(d) that the admission and/or the retention of proposed names in the RDPT is unreasonable and irrational.

**[3]** During the application for leave, learned senior federal counsel ('SFC') acting for the honourable attorney general has raised a preliminary objection that leave should not be granted as there is an alternative remedy of appeal under the 2002 Regulations.

**[4]** Having considered the application and the submission of the parties, this court had dismissed the learned SFC's preliminary objection and granted the application for leave.

THE SALIENT FACTS

**[5]** The applicants are the registered voters in Segamat election area.

**[6]** The first respondent (the 'SPR') is the Election Commission of Malaysia constituted under art 114 of the Federal Constitution and its functions are defined in art 113(1) and (2) of the Federal Constitution read with the Elections Act 1958 and other relevant election regulations.

**[7]** The second respondent is the Registrar of Electors for the State of Johore appointed under s 8 of the Elections Act 1958. The second respondent heard the objections to the registration of the proposed names in the RPDT in a public inquiry held pursuant to reg 17 of the 2002 Regulations.

**[8]** On 23 October 2017, the respondents have issued the *Gazette* PU(B) 503, which states that any names given in encl A will be admitted into RDPT 2017 as voters for Segamat election area and will cast vote in the locality of Segamat camp. The proposed names consisted of the names of members of the armed forces and their spouses ('the proposed voters'). A B

**[9]** The applicants take the position that the development of Segamat Camp is not complete. Therefore, the applicants raised an objection to the admission of the proposed names in the RDPT. C

**[10]** Premised on the applicants' objections, a public inquiry ('the inquiry') was held pursuant to reg 17 of the 2002 Regulations from 4–10 December 2017. D

**[11]** During the inquiry, the applicants complained that all or some of the following incidents had happened:

(a) that the inquiry was held privately;

(b) that the applicants were not allowed to be represented by a lawyer. However, some of the applicants were asked with legal questions; E

(c) that during the inquiry, the proposed voters were represented by an army captain;

(d) that during the inquiry, the second respondent was clearly in favor of the proposed voters; F

(e) that the proposed voters gave no evidencethat they resided in the Segamat election area; and

(f) no certificate of compliance and fitness were tendered as evidence. G

**[12]** All objections raised by the applicants were dismissed by the second respondent. The respondents will maintain the proposed names in the RDPT.

**[13]** On 12 December 2017, the applicants have filed their appeals against the decision of the second respondent pursuant to reg 20 of the 2002 Regulations. The said appeals have been fixed for hearing on 2–7 January 2018. H

**[14]** Despite filing their appeals on 12 December 2017, the applicants have also filed this application for judicial review to quash the inclusion of the proposed names in the RDPT. I

A THE FINDINGS OF THE COURT

**[15]** The AG has raised a preliminary issue, that there is a special provision of appeal under reg 20(1) of the 2002 Regulations, which reads:

B (1) Any claimant, objector, or person in regard to whom objection has been made may, if he is aggrieved by a decision of the Registrar in respect of a claim or objection, appeal to an Adjudicating Officer.

**[16]** Therefore, based on the following cases, the applicants should first C exhaust the appeal process before filing this application:

(a) *Ketua Pengarah Hasil Dalam Negeri v Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 1 MLJ 563; [2017] 2 CLJ 1;

(b) *Iskandar Coast Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2017] D MLJU 1796; [2017] 1 LNS 1722;

(c) *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555; [2008] 6 CLJ 235;

(d) *Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal for Ulu* E *Kinta & Ors* [1972] 1 MLJ 70;

(e) *National Land Finance Co-operative Society Ltd v Ketua Pengarah Hasil Dalam Negeri* [1998] MLJU 235; [1998] 4 CLJ Supp 232; and

F (f) *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 4 MLJ 771; [2010] 5 CLJ 574.

**[17]** All the above cases share the common principle which was enunciated G in the case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, where the Supreme Court held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, certiorari should not normally issue save in exceptional circumstances. The exceptional circumstances required to be established by the H applicants are:

(a) that the respondents had a clear lack of jurisdiction; or

(b) that there was a blatant failure by the respondents to perform some statutory duty; or

I (c) that there was a serious breach of the principles of natural justice.

**[18]** However, it is the submission of the applicants that even though the applicants have filed their appeals under reg 20 of the 2002 Regulations, the issue of alternative remedy should have been properly taken during the

substantive stage. The applicants relied on the cases of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 and *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113, where both the Court of Appeal (in *QSR Brands*) and the Federal Court (in *Lai Cheng Cheong*) held that the issue of alternative remedy is relevant only during the substantive hearing.

**[19]** This very issue was also considered by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Glugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65, and the Federal Court held as follows:

> (2) The Alternative Remedy Point
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> Did the existence of the statutory remedy of appeal and its non-exercise, in this case, exclude Judicial Review?
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> Before considering this question, we should like to make a preliminary observation regarding the stage at which the question of alternative remedies should be dealt with. There is no hard and fast rule about this. As we have said, the case of R v Secretary of State for the Home Department ex p, Swati (ibid) shows that the *existence of alternative remedies would be a ground for refusing leave to apply for judicial review*. It is also *a ground for setting aside a grant of leave* given earlier. (*R v Secretary of State for the Home Department ex p Davendranath Doorga* [1990] COD 109). Again, *the alternative remedies argument may be considered at inter partes stage, even if leave had been granted and not challenged* (*R v Brentford General Commissioners, ex p Chan* [1986] STC 65. At the final hearing stage, the court can consider the alternative remedies objection as a preliminary point ... (Emphasis added.)

**[20]** In *Chin Mee Keong & Ors v Pesuruhjaya Sukan* [2007] 6 MLJ 193; [2007] 5 CLJ 363, the Court of Appeal held that the issue of alternative remedy may be raised at the application for leave. Justice James Foong JCA held as follows:

> [29] So the question to be asked in our instant case is whether the appellants' application is frivolous and vexatious to justify refusal of leave in limine. The learned judicial commissioner answered this in the affirmative based primarily on the fact that there exist an alternative domestic remedy for the appellant to appeal against the decision of the respondent under s 21(1)(c) of the SD Act. But does the availability of this remedy alone justify the refusal of leave to apply for an order of certiorari?
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> [30] I am aware that this court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, has gone as far as to declare:
>
> > In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.
>
> [31] But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited. *To*

*summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail in limine on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles* particularly that of *Mohamed Nordin bin Johan v Attorney General, Malaysia* which is a Federal Court case and the Supreme Court decision in *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; [1986]2 CLJ 409; [1986] CLJ Rep 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave in limine. *In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of certiorari after leave has been granted.* (Emphasis added.)

**[21]** Since the issue of alternative remedy has been raised at the leave stage, then this court will consider the same in light of the established test.

**[22]** In the present application, the learned SFC submits that since there is a statutory appeal process pursuant to reg 20(1) of the 2002 Regulations and that the circumstances of this case does not fall within the exceptional circumstances within the case of *Jagdis Singh*, then this application for leave must be dismissed. Added to that, since the applicants have also filed an appeal under reg 20, then this application is an abuse of the process of the court.

**[23]** Regulation 20 of the 2002 Regulations reads:

20 Appeal

(1) Any claimant, objector, or person in regard to whom objection has been made may, if he is aggrieved by a decision of the Registrar in respect of a claim or objection, appeal to an Adjudicating Officer.

(2) Every appeal shall be in writing and —

(a) shall be signed by the appellant;

(b) shall state shortly the grounds of appeal; and (c) shall be delivered to the Adjudicating Officer together with a fee of five ringgit;
*within ten days from the date of the decision in respect of which the appeal is made.*

(3) An Adjudicating Officer shall hear such appeals in public after giving not less than four clear days' written notice of the date, time and place of the hearing of the appeal to the parties concerned and may at his discretion hear any further evidence.

(4) *The determination of the appeal by the Adjudicating Officer shall, under these*

*Regulations, be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground.*

(5) ...

(6) ...

(7) ...

(8) ... (Emphasis added.)

**[24]** Therefore, sub-reg 20(4) provides that the determination of the appeal under sub-reg 20(1) shall be final and shall not be challenged or questioned in, or reversed, altered or quashed by, any court on any ground.

**[25]** As such, in view of the ouster clause in sub-reg 20(4) of the 2002 Regulations with regards to the determination of the appeal, it would be a futile attempt for the applicants to be confined only to the appeal process.

**[26]** In view of the ouster clause in sub-reg 20(4) of the 2002 Regulations, I am of the considered opinion that there is special circumstance in this case which justifies the granting of leave.

*Application for leave granted.*

Reported by Dzulqarnain Ab Fatar